EXCESS "OTHER INSURANCE" CLAUSES: TO CONTRIBUTE OR SUBROGATE? [DISCUSSION OF *SAMANCOR LTD V MUTUAL & FEDERAL INSURANCE CO LTD* 2005 4 SA 40 (SCA)]

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1 Introduction

The formal introduction of English insurance law principles into the Cape and Orange Free State[1] appears to have paved the way for the introduction of the rights to contribution and subrogation into South African law.[2] This introduction took place without due regard for the doctrinal bases of these concepts in their systems of origin.[3] Contribution and subrogation still present our courts with difficulties, especially with regard to their respective areas of application and interaction. The question whether to use subrogation or contribution can be crucial in a given situation, since a wrong choice would probably result in an insurer being non-suited.[4] These difficulties are also exacerbated by insurers adopting standard clauses, including so-called "other insurance" clauses,[5] which have established meanings in foreign jurisdictions. The impact of these "other insurance" clauses on the rights to contribution and subrogation has not received much attention in South African law. The excess "other insurance" clause, in particular, is an example of a clause which has escaped judicial scrutiny.[6]

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1 S 2 of the General Law Amendment Act 8 of 1879 introduced English law to regulate "every suit, action and cause having reference to fire, life and marine assurance" English law thus became binding in the Cape Colony The law applying in the Cape, and therefore English law, was introduced into the Orange Free State via the General Law Amendment Ord 5 of 1902

2 In this regard see the instructive comments of Harms ADP in *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 http://www saflii org/za/cases/ZASCA/2008/114 html (accessed 26-01-2009) See also n 8

3 The generally accepted view is that the rights of contribution and subrogation in English law are based in equity See also Merkin *Colinvaux's Law of Insurance* 8 ed (2006) 379, 414

4 See the discussion of *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) below

5 "Other insurance" clauses govern the insurer's relationship with the insured where another valid policy also covers the risk insured against See 4 below

6 South African cases on "other insurance" clauses have focused mainly on *pro rata* "other insurance" clauses, where the existence of double insurance effectively means that the insurer will only be liable for its *pro rata* share of the insured's loss See *Lange & Co v SA Fire & Life Assurance Co* 1867 5 Searle 358; *Nathanson v Commercial Insurance Co* 1886 4 SC 461 Although escape clauses have featured in some cases, our courts have not dealt with them specifically (see *Refrigerated Trucking v Zive NO (Aegis Insurance Co Ltd, third party)* 1996 2 SA 361 (T))

In *Samancor Ltd v Mutual & Federal Insurance Co Ltd*[7] ("*Samancor*"), the Supreme Court of Appeal had the opportunity to assess the impact of an excess "other insurance" clause on the rights to contribution and subrogation. This article analyses the impact of excess "other insurance" clauses on the rights to contribution and subrogation with reference to this decision.

2 The right to subrogation

The right to subrogation was introduced into South African law in *Ackerman v Loubser*.[8] In this case Ward J held that

> "[an] accident policy is a contract of indemnity and from that it follows that the insurers who have indemnified the insured are entitled upon the principle of subrogation to the advantage of every right vested in the latter".[9]

The above dictum sets the parameters for defining the right of subrogation. A workable definition is provided by Davis who states that "[subrogation] means the substitution of one person for another, so that the person substituted or subrogated succeeds to the rights of the person whose place he takes".[10] Unlike English law,[11] the South African application of the right to subrogation has been limited to contracts of insurance.[12]

In the context of insurance law, the insurer, having indemnified the insured, steps into the shoes of the insured, succeeding to all rights and benefits the insured may have against the third party who caused the loss of the insured. The right to subrogation arises *ex lege*, where an insurer has indemnified the insured. The right to subrogation is therefore limited to indemnity insurance.[13]

Subrogation does not effect a transfer of the insured's rights of recourse against third parties.[14] The claim remains that of the insured, and is brought by the insurer in the name of the insured. However, in *Rand Mutual Assurance Co Ltd v Road Accident Fund,*[15] Harms ADP questioned the practice that the insurer must institute action against a third party wrongdoer in the name of the insured.[16] He allowed the insurer to sue in its own name on the basis of subrogation. The judge questioned whether the rule that the insurer has to sue

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7 2005 4 SA 40 (SCA) For a discussion of the unreported WLD decision and the SCA decision, see Van Niekerk 2003 *Juta's Insurance L Bul* 28; Van Niekerk 2003 *Juta's Insurance L Bul* 166

8 1918 OPD 31 In *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 para 14, Harms ADP alludes to the fact that this introduction was the result of the General Law Amendment Act 8 of 1879 and General Law Amendment Ord 5 of 1902 The court was bound to apply English law, thereby introducing the right of an insurer to be subrogated to the rights of the insured

9 *Ackerman v Loubser* 1918 OPD 34

10 Davis *Gordon and Getz's The South African Law of Insurance* 4 ed (1993) 257

11 See McGee *The Modern Law of Insurance* (2001) 297

12 Subrogation is generally regarded as a *naturale* of the contract of insurance See also discussion below

13 See Davis *SA Law of Insurance* 257

14 Reinecke, Van der Merwe, Van Niekerk & Havenga *General Principles of Insurance Law* (2002) para 373

15 [2008] ZASCA 114

16 See Van Niekerk "Insurance Subrogation, Implied or Expressed: in the Name of the Insured always" 2007 *SA Merc LJ* 502. The author describes the right of the insurer to institute action in the name of the insured as fundamental to the right of subrogation

in the name of the insured was in accordance with the general principles of our law.

Harms ADP expressed the opinion that "to require a party to litigate in the name of another appears to … fly in the face of the requirement of transparency that underlies all litigation."[17] The judge also pertinently stated that "[the] rule serves no public interest in modern times", regarding it as "formalistic" and as creating anomalies.[18] However, despite describing the practice of the insurer litigating in the name of the insured as "less than desirable", the judge nevertheless refrained from abolishing the practice.[19]

The question whether an insurer can enforce the rights of the insured in its own name highlights the substantive question regarding the legal basis of the right of subrogation.[20] However, the matter was dealt with as a question of procedure. Harms ADP, despite referring to an academic debate regarding the substantive aspects of the right to subrogation,[21] chose not to enter this debate. He assumed that an *ex lege* transfer, akin to cession, does not take place.[22]

2 1 The purpose and legal basis of the right to subrogation

The purpose and legal basis for the right to subrogation is unclear. Even in English law there appears to be a debate as to whether it originated in common law or is based on equity.[23] It is therefore understandable that the introduction of the right into another system may present the adoptive system with difficulties.

2 1 1 The purpose of subrogation[24]

It is generally accepted that the right to subrogation underpins the principle of indemnity.[25] This explains the right of an insurer to recover any indemnity paid by it to the insured where the insured has also recovered damages for the same loss from a third party wrongdoer. Also, to prevent the insured from

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17 *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 para 23

18 Para 23 See also Moll "Die Subrogasie Leerstuk in die Versekeringsreg" 1977 *TSAR* 138 145, where the author identifies the procedural secrecy of subrogation as an inherent weakness

19 *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 para 24

20 Another substantive issue would be whether the right involves or should involve an *ex lege* transfer of the rights of the insured to the insurer in a manner akin to cession In such a case the insurer would be able to institute an action in its own name

21 *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 para 20 See also Schlemmer "'n Selfstandige Reg Van Verhaal vir 'n Versekeraar gegrond op 'n Solidêre Medeskuldverhouding" 1996 *TSAR* 68; Van Niekerk "Subrogation and Cession in Insurance Law: a Basic Distinction confounded" 1998 *SA Merc LJ* 58; Van Niekerk 2007 *SA Merc LJ* 502

22 *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 para 20

23 McGee *Law of Insurance* 299 The author refers to two rules governing the right to subrogation The first is the rule that the insurer may recover from the insured any sum which the insured recovers from a third party in diminution of his insured loss The second is the rule that the insurer may require the insured to lend his name to an action against a third party from whom he has the opportunity to recover such sums The author's contention is that the first rule has its origins in common law (see authorities cited at 301), while the second appears to be based in equity (see the judgment of Lord Denning MR in *Morris v Ford Motor Co* [1973] 2 All ER 1084 (CA))

24 See also Moll 1977 *TSAR* 140

25 *Castellain v Preston* (1883) QBD 380, (A) 387; *Morris v Ford Motor Co Ltd* QB 792 (CA) See also Reinecke et al *General Principles* para 376 and Davis *SA Law of Insurance* 257

receiving double indemnity, the insurer, for its own benefit, can enforce the rights of the insured against a third party wrongdoer.

Subrogation is also regarded as providing the insurer with a right of recourse.[26] This practical consequence, if not purpose, of the right to subrogation cannot be denied. At least against the insured, the form of subrogation that allows an insurer to recover from an insured who has claimed both an indemnity from the insurer and damages from the third party,[27] could sufficiently be explained as providing such an insurer with a right of recourse.

Another purpose which has been identified is that a person who has caused a loss should ultimately bear the responsibility for that loss.[28] This reason also underpins the principle that an insurance payout is a *res inter alios acta* as far as the wrongdoer is concerned. The wrongdoer would thus not be able to raise the existence of an insurance policy as a defence to a claim brought by the insured.

All three of the above reasons appear to be of relevance to the right of subrogation although none of them, on their own, fully account for the right as such. However, whether the right to subrogation is necessary to achieve the above aims is doubtful. A cession of the insured's right against a third party to the insurer, as well as an enrichment action by the insurer against the insured or the third party wrongdoer, would similarly satisfy the indemnity principle. Moreover, the third party wrongdoer would bear the responsibility for the loss it has caused, while the insurer would also have a right of recourse.[29]

2 1 2 The legal basis of subrogation

In English law, the basis of subrogation is unclear; whereas it is recognised that it at times operates by virtue of an implied term in contracts of insurance, it also described as an equitable remedy.[30] South African law, however, does not traditionally recognize that equity can be the basis of a right, and has to identify an appropriate alternative. The general view appears to be that the right to subrogation is a *naturale* of the contract of insurance.[31] This view poses no theoretical problem, since the mere fact that an insurance contract was concluded would imply the right to subrogation.

Another possibility is that the right to subrogation is an extension of enrichment liability.[32] However, the need for the right to subrogation becomes questionable if one regards enrichment liability as the basis for the right. An insurer should simply be allowed to claim on the basis of enrichment where possible, rather than it forming the basis for a right to subrogation.[33] Allowing subrogation, in addition to enrichment liability, would appear to amount to

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[26] Reinecke et al *General Principles* para 376

[27] See n 23 above

[28] Reinecke et al *General Principles* para 376

[29] Para 376 The authors argue that the principle of indemnity may be retained, without recourse to the doctrine of subrogation, by simply releasing the third party from liability

[30] *Bank Financiere de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475, [1999] 1 AC 221 See also n 25 above

[31] See Reinecke et al *General Principles* para 377 and the authorities quoted there The dictum of Ward J in *Ackerman v Loubser* 1918 OPD 31 also readily lends itself to the idea that subrogation is to be regarded as a *naturale* of a contract of indemnity insurance

[32] Reinecke et al *General Principles* para 377

[33] In this regard see Moll 1977 *TSAR* 147

an unnecessary multiplication of rights and remedies. The insurer should be able to recover from its insured on the basis of enrichment where the latter has made a double recovery. The insured should similarly be able to claim on the basis of enrichment from a third party wrongdoer, or another party primarily liable to the insured, where any of such parties has benefited from the insurer's payout to the insured.

Reinecke and others question whether it would be satisfactory to subject the insurer's right to the "niceties" of the rules of unjustified enrichment.[34] The authors' main concern appears to be the possible defence by an insured that it has squandered the proceeds recovered from the third party. However, there may be a simple solution to this perceived problem.

The right of an insured to claim from a third party could be abolished by one stroke of the legislature's pen.[35] This has for example been done in the case of claims against the Road Accident Fund.[36] Such a development would take care of the perceived problem of an insured squandering proceeds. The insurer will also have a direct action against a third party wrongdoer on the basis that the latter has been enriched at the expense of the former.[37] This will have the added advantage of the actual wrongdoer ultimately bearing responsibility for the loss it has caused. Even if this is not considered to be a viable option, an appropriate clause in the contract of insurance could conceivably afford the insurer a remedy in the event of an insured squandering proceeds recovered from a third party.

However, the uncertainties regarding the legal basis of the right to subrogation remain. In this regard, the criticism of Harms ADP that "the rule serves no public purpose in modern times"[38] is particularly noteworthy. Although the criticism pertains to the procedural aspect of an insurer instituting action in the name of the insured, the very need for the right to subrogation can similarly be criticized.

Our law is capable of addressing the purposes of the right to subrogation without resorting to a right to subrogation.[39] In this regard, the availability of cession, as well as enrichment liability, would render an additional right to subrogation unnecessary.[40]

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34 *General Principles* para 377

35 See n 31 above The authors consider the taking away of the insured's right against the third party as a way in which the indemnity principle may be maintained However, this would also take care of the main concerns of the authors pertaining to enrichment liability as the basis of the right to subrogation

36 S 21 of the Road Accident Fund Act 56 of 1996 See also Moll 1977 *TSAR* 143, who refers to Sweden as an example where the insured would not have a remaining claim against a third party wrongdoer after the former has received an indemnity from its insurer Similarly, the insurer would not have such a right against the third party Moll points out that this is an indication of how communities view the operation and effects of subrogation differently

37 Moll 1977 *TSAR* 148 The author regards subrogation as a phenomenon of the transfer of the insured's rights, which would then allow the application of the *condictio indebiti*.

38 *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 para 18

39 See Moll 1977 TSAR 142, for his discussion on whether or not subrogation should be abrogated in our law It is clear from the author's arguments that the arguments for and against the retention of subrogation revolve around public policy concerns

40 See n 39

2 2 Subrogation and cession distinguished[41]

Cession involves the transfer of personal rights between a cedent (the insured) and cessionary (the insurer). In this manner, cession involves the substitution of a new creditor (the cessionary) for the original creditor (the cedent).[42] The effect of a cession is to divest the insured of its rights against the third party wrongdoer with the insurer becoming the new holder of such rights. Unlike the right to subrogation, at least prior to *Rand Mutual Assurance Co Ltd v Road Accident Fund*,[43] the insurer as cessionary will enforce the rights in its own name.

Subrogation, even recast as a procedural device enabling the insurer to enforce the insured's rights in its own name, does not involve a transfer of the insured's right of recourse against the third party wrongdoer to the insurer. The right remains that of the insured. In light of the availability of cession, as mentioned above, a right of subrogation that involves the *ex lege* transfer of the insured's rights to the insurer would appear unnecessary.

2 3 Primary, secondary and equal and co-ordinate liability

The fact that both the insurer and the wrongdoer are debtors of the insured is an important issue which requires further consideration.[44] Why should the insurer be allowed to enforce the right of the insured against another debtor? Apart from the principle that the wrongdoer should not derive a benefit from the insured's insurance policy, and the principle that double recovery by an insured should be prevented, there is another possible explanation, which is rooted in the idea of primary and secondary liability.[45]

The notion of primary liability, as opposed to secondary liability, is particularly important where an insurer wishes to sue another insurer on the basis of subrogation. A third party wrongdoer, whether delictually or contractually liable, is generally regarded as having primary liability towards the insured, while the insurer's liability is secondary.[46] For this reason, payment by the insurer will not discharge the third party from liability.[47] Here, the very existence of primary liability precludes the third party wrongdoer from being discharged by an insurance indemnity. Payment by the insurer is not payment of the third party's obligation, but the discharge of the insurer's own obligation in terms of the insurance policy.[48] The insurer would, therefore, be allowed to bring a subrogated claim against the wrongdoer.[49]

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41 For a comprehensive discussion of cession and subrogation, see Van Niekerk 1998 *SA Merc LJ* 58

42 Christie *The Law of Contract in South Africa* 5 ed (2006) 463

43 [2008] ZASCA 114

44 The underlying *causa* of the indebtedness obviously differs While the wrongdoer's liability flows from a delict against the insured or contractual default, the insurer's liability will be the result of its conscious undertaking to indemnify the insured in terms of a contract of insurance

45 *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 SCA para 5

46 Para 5.

47 *Samancor Ltd v Mutual and Federal Insurance Co Ltd* [2003] JOL 12391 (W) para 6

48 Para 6

49 *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 SCA para 5

The different levels of liability appear to be the reason for the difficulties experienced when one insurer wishes to bring a subrogated claim against another insurer.[50] An insurer that intends to bring a subrogated claim against another insurer will have to show that the latter's liability towards the insured is primary to its own.[51] The Supreme Court of Appeal in *Samancor* accepted that an insurer can undertake primary liability *vis-à-vis* another insurer covering the same loss, thereby enabling the latter to bring a subrogated claim against the former.[52] However, should the liability of the insurers be equal or co-ordinate, subrogation will not be available to either of them.[53] Moreover, payment by the one insurer will discharge the other. In this regard, contractual terms become singularly important in determining whether the liability of one insurer towards the insured is primary or secondary.[54]

The court in *Samancor* used the term "equal and co-ordinate" liability to refer to insurers on the same level of liability. However, the term appears to be tautologous.[55] In the cases of *Caledonia North Sea Ltd v British Telecommunications Plc (Scotland)*[56] and *Samancor Ltd v Mutual and Federal Insurance Co Ltd,*[57] only the word "co-ordinate" was used to describe insurers on the same level of liability. "Equal" and "co-ordinate" liability were used together for the first time in the Supreme Court of Appeal. Where the liabilities of the insurers are equal or co-ordinate, the right of an insurer to claim a contribution from another insurer also liable for the same loss comes into play.

3 The right to contribution

The right of an insurer to claim a contribution from a co-insurer liable for the same loss mirrors subrogation in the sense that it also does not fit comfortably in the generally accepted sources of liability in South African law. Nevertheless, like subrogation, it is well established. The right to claim a contribution is a right of recourse by one insurer against another insurer who has insured the same loss.[58] The right belongs to the insurer, and it will bring a claim for contribution in its own name against another insurer for the latter to contribute proportionately.[59]

3 1 The basis of the right to contribution

The right of an insurer to claim a contribution from a co-insurer with equal or co-ordinate liability is based neither in delict nor on any contractual link

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50 Here "other insurance" clauses or the nature of the insurance policies involved could prove important See for example the discussion below of excess policies where the nature of the policy means that the underwriter will have liability secondary to that of a standard indemnity policy

51 See discussion of *Samancor* in 7 below

52 Para 5

53 Para 5

54 See the discussion of "other insurance" clauses in 4 below

55 Allen (ed) *The Penguin English Dictionary* 2 ed (2003) defines co-ordinate as "equal in rank, quality, or significance"

56 [2002] 1 All ER (Com) 321 (HL)

57 [2003] JOL 12391 (W)

58 Reinecke et al *General Principles* para 520

59 Para 520

between the co-insurers.[60] Some American authorities suggest that it is aimed at preventing one insurer from profiting at the expense of another, which suggests that it could be regarded as akin to enrichment liability.[61] The South African commentators Davis,[62] and Reinecke and others,[63] regard the English case of *Godin v London Assurance Co*[64] as the standard authority on contribution. Older South African cases similarly make reference to the *Godin* case.[65]

Reinecke and others assume that, like subrogation, "a right to contribution is a *naturale* of a contract of indemnity insurance".[66] However, this is not an entirely satisfactory explanation. The *naturale* construction of a right to contribution would only provide an answer if it takes the form of a term for the benefit of a third party. This would be the only way in which the right to contribution of one insurer against another could arise from the latter's insurance contract with the insured. However, this construction provides for a contractual nexus between the insurers, which is contrary to the generally accepted view that the right to contribution is not based on any contract between them.[67]

Nevertheless the right to contribution has, through its early acceptance and constant use by our courts, achieved the status of an unquestioned right in law.[68] Malan J in *Samancor Ltd v Mutual and Federal Insurance Co Ltd*,[69] with reference to *Godin v London Assurance Co,*[70] accepted that the right to claim a contribution was founded on the principles of natural justice and equity. However, this cannot be the sole basis for the right to claim a contribution in South African law as equity cannot be the only basis for a right in South African law.

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60 *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) para 16; Reinecke et al *General Principles* para 520 See further H K C "The Law of Contribution" *The American Law Register (1852-1891)* Vol 17 No 8 New Series Vol 8 (1869) 449 450, where it is observed that some courts of law have advocated "[the] idea that contribution depends upon the theory of an implied contract … " Apparently, this was done more to exercise "jurisdiction, and to overcome some technical objections to the *form* of the action, than from any idea that such an implied contract actually exists" (450-451) Valid arguments are raised in this article as to why contribution should not be based on an implied contract It is submitted that this basis would not hold water in South Africa, where the contribution principle has never been viewed or advocated in this manner

61 In the US case of *Fireman's Fund Ins. Co. v Maryland Casualty Co.* 65 Cal App 4th 1279, 77 Cal Rptr 2d 296 (1998), the court described the workings of contribution in the following manner:

> " … the aim of equitable contribution is to apportion a loss between two or more insurers who cover the same risk, so that each pays its fair share and one does not profit at the expense of the others" (1296)

See also Smith & Simpson "Excess Other Insurance Clauses and Contractual Indemnity Agreements shifting an Entire Loss to a particular Insurer" 2004 *Thurgood. Marshall L Rev* 215; *Samancor Ltd v Mutual and Federal Insurance Co Ltd* [2003] JOL 12391 (W) para 11

62 Davis *SA Law of Insurance* 289

63 Reinecke et al *General Principles* para 520

64 1758 1 Burr 489

65 See *O'Flynn v Equitable Fire Insurance* Co 1866 1 Roscoe 372; *Lange & Co v SA Fire & Life Assurance Co* 1867 5 Searle 358; *Nathanson v Commercial Insurance Co* 1886 4 SC 461 See also *Samancor v Mutual and Federal Insurance Co Ltd* [2003] JOL 12391 (W)

66 Reinecke et al *General Principles* para 520

67 *Samancor Ltd v Mutual & Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) para 15

68 Whether or not the right to contribution was adopted from English law where equity is regarded as the source of contribution, its unquestioned existence in South African law is the direct result of consistent uniform application by our courts of law

69 [2003] JOL 12391 (W) para 4

70 1758 1 Burr 489

Malan J also suggested that the right to claim a contribution can "'fit' into our law" if the different policies can be regarded as one.[71] Where the indemnity provided by one insurer discharges another insurer, the latter will be liable for a contribution based on unjustified enrichment.[72] As is the case with subrogation, resorting to this fiction brings to the fore the possibility of enrichment liability. However, given that the basis of the right to contribution was not in issue, the judge avoided exploring this possibility further.

Perhaps the right to contribution would best be treated as a *sui generis* concept of insurance law. It is a fact that insurers fulfill an important social function. Therefore, one should not simply discard a principle that could play a role in reducing the potential economic burden on one insurer having to foot the whole bill where others are equally liable. Here the right to contribution appears to facilitate a fair distribution of costs over the industry as a whole.

However, South African authors have questioned the value of the continued existence of this right.[73] The extent to which insurers can protect themselves against claims for contribution by the insertion of "other insurance" clauses[74] does seem to raise questions about the necessity of affording an insurer this right.

3 2 Requirements for a right to contribution

Reinecke and others list the following requirements for a right to contribution to arise:[75]

(i) the insurer claiming contribution must have discharged its liability;
(ii) the insurer must have paid more than its rateable proportion of the loss;
(iii) the payment must have been in respect of an interest which is the object of double insurance existing at the time of the loss; and
(iv) the double insurance must have been for an amount in excess of the loss.

The authors appear to suggest that the commonality of the object of risk is a requirement for the existence of double insurance, which in turn is one of the requirements for a claim in contribution to arise. Davis, however, deals with this separate requirement for double insurance as a direct requirement for contribution.[76] On a practical level, though, this apparent difference would probably not matter as the satisfaction of the requirements for double insurance would partly satisfy the requirements for contribution. Ivamy adds, as a requirement for contribution, that a policy must not contain any stipulation by which it is

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71 *Samancor v Mutual and Federal Insurance Co Ltd* [2003] JOL 12391 (W) para 11
72 Para 11
73 Reinecke et al *General Principles* para 522 The authors question whether it is worthwhile to develop this branch of the law (contribution), rather than simply jettisoning the concept all together
74 See discussion in 4 and 8 2 below
75 Reinecke et al *General Principles* para 521
76 Davis *SA Law of Insurance* 289

excluded from contribution.[77] This is an indication of the acceptance that the right to contribution can be varied by contractual provisions. This much also appears from the *Samancor* judgment.[78] The court accepted that "indemnity policies may validly contain terms excluding rights of contribution".[79]

The requirements for contribution as elucidated by the above authors can be merged into the following general statement: the right to contribution arises where a situation of double insurance exists and one of the insurers has paid more than its share of the loss. Merkin observes that the existence of double insurance is a matter of construction of the relevant policies.[80] It thus becomes evident that the inclusion of "other insurance" provisions can be a determining factor when deciding whether or not a situation of double insurance exists.

Should the right to contribution arise between insurers, it would exclude the possibility of a claim for subrogation.[81] However, both these rights further the indemnity principle in that an insured can only recover up to the extent of his loss. In the case of subrogation the insured's claim against a third party is not extinguished, while in the case of a claim for contribution the insured, having been indemnified, would have no remaining rights of indemnity against another insurer. The right to subrogation is the right of the insurer to enforce the insured's claim against a third party, while the right to contribution arises between two insurers liable for the same loss.

Where the insured is indemnified against a loss not emanating from the actions of a third party against whom the insured might have had a right in delict or contract, subrogation would have no role to play. There would simply be no rights of the insured that the insurer could enforce in the name of the insured or, as decided in *Rand Mutual Assurance Co Ltd v Road Accident Fund*,[82] even in its own name. However, the right to contribution is not limited in this manner, as long as a situation of double insurance exists.

In furthering the indemnity principle, the rights to subrogation and contribution appear to be linked. However, different considerations and requirements underpin these two rights. The use of the appropriate clauses in a contract of insurance, and the proper interpretation of these clauses, can determine whether an insurer may bring a claim for contribution or subrogation. "Other insurance" clauses will usually determine which of two or more insurers' liability is primary or secondary *vis-à-vis* the other insurer, or whether the insurers' liabilities are equal and co-ordinate. This in turn determines whether an insurer should proceed by way of a subrogated claim, or a claim for contribution in its own name.

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77 Ivamy *General Principles of Insurance Law* 6 ed (1993) 518
78 2005 4 SA 40 (SCA) para 5
79 Para 14
80 Merkin *Law of Insurance* 414
81 Reinecke et al *General Principles* para 520
82 [2008] ZASCA 114

4 The impact of "other insurance" clauses: subrogation or contribution?

"Other insurance" clauses are typically employed where the possibility of overlapping insurance cover exists.[83] Three basic types of "other insurance" clauses can be distinguished.[84] First, *pro rata* clauses restrict the liability of the insurer to its proportion of the loss based on the ratio between its policy limit and the total cover available as a result of other insurance covering the same risk.[85] In South African law, these types of clauses have generally met with approval from our courts.[86] Secondly, escape clauses allow the insurer to avoid liability completely where there are other valid and collectible insurance policies.[87] Thirdly, excess insurance clauses, which apply in the event of double or overlapping insurance, effectively only provide cover once all other valid and collectable insurance have been exhausted.[88] These clauses all have the effect of excluding a situation of double insurance and, consequently, the right of an insurer to claim a contribution from another insurer that would otherwise have been liable for the same loss.

In *Samancor* the court had to decide whether the nominal plaintiff was non-suited because the insurers, suing in the name of the insured, proceeded by way of subrogation against the respondent insurer. The existence of an excess "other insurance" clause and its effect on the right to claim contribution or subrogation was of particular importance.

5 The facts in Samancor[89]

The appellant insured an alternator with the respondent under a "Principal Controlled Construction Risks and Public Liability Insurance Policy" (the "works policy"). The appellant also obtained cover for the same alternator from Westchester Insurance Co (Pty) Ltd ("Westchester"), under an "Asset Insurance Policy" (the "asset policy"). The alternator was damaged and the appellant submitted a claim under the asset policy with Westchester. Westchester fully indemnified the insured for its loss.

Westchester then instituted proceedings against the respondent by way of a subrogation action in the name of the appellant. The respondent raised a special plea to the appellant's *locus standi* in the court *a quo*, averring that the appellant could not seek a further indemnity from it. The respondent contended that the appellant was fully indemnified under the asset policy and was therefore not entitled to a further indemnity from it for the same loss. Westchester could not invoke a right to subrogation to recover what it had

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83 See Richmond "Issues and Problems in 'Other Insurance', Multiple Insurance, and Self-Insurance" 1995 *Pepp L Rev* 1373

84 Baily "Competing 'Other Insurance' Clauses under Iowa Law: a New Direction?" 1997-1998 *Drake L Rev* 835

85 837

86 Reinecke et al *General Principles* para 519 Also see n 6

87 Baily 1997-1998 *Drake L Rev* 837

88 837-838

89 The article is limited to an analysis of the decision of the SCA because it merely confirmed the findings of the court *a quo*.

paid to the appellant, but had to claim a contribution from the respondent in its own name.

The two important questions on appeal were the following. First, did Westchester, by indemnifying the insured, obtain a right of subrogation against the respondent to enforce the insured's claim against the respondent, or did it have to pursue its claim against the respondent in its own name by way of a claim for contribution? Secondly, was the wording of the two insurance policies such as to create a hierarchy of primary and secondary obligations between the two insurers? This second question ultimately determined the first, and was also the question which necessitated the examination of the excess clause contained in the asset policy.

6 The decision in Samancor

Conradie JA referred to the established principle that a wrongdoer cannot resist a claim by an insurer on the basis that the insurer has indemnified the insured, and that payment by the insurer is *res inter alios acta*.[90] However, he admitted that this was not the best way of looking at the problem. He drew a distinction between primary and secondary indemnification and accepted that a subrogation claim can be entertained where the liability of the claimant (insurer) is secondary to the liability of the party against whom a claim for indemnification is brought.[91] An insurer is typically a secondary debtor and, upon indemnifying an insured, will have a claim against a delictual wrongdoer or contractual defaulter who caused the harm against which indemnification was obtained. Conversely, insurers as equal or co-ordinate indemnifiers would not be allowed to bring subrogation claims against each other.

The court accepted that an insurer could agree to become a primary indemnifier with other primary indemnifiers, in which case other insurers would have a subrogated claim against it. Westchester, therefore, accepted that it had to show that the liability of the respondent was not equal or co-ordinate with its own liability, and proceeded to set out that the respondent had, exceptionally for an insurer, undertaken primary liability.

The court considered various clauses contained in the two policies to ascertain whether, as a result of their operation, the liability of the respondent was primary in relation to that of Westchester. The relevant clause in the respondent's works policy, found in "Memorandum 4 – Subrogation", provided as follows:

> "' … [Notwithstanding] anything stated in the policy, … this policy shall take precedence over any other insurance arranged by or on behalf of the Employer. In the event of loss or damage which may be insured under any other policy of insurance effected by the Employer, the Insurers shall indemnify the Insured as if such other insurance did not exist. … [The] Insurers waive all rights of subrogation or action which they may have or may acquire against any of the parties comprising the Insured or their directors, agents or employees or their Insurers arising out of any occurrence on the Contract Site in respect of which any claim is admitted hereunder ….'"[92]

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[90] Para 4

[91] In this regard he referred to the speech of Lord Hoffman in *Caledonia North Sea Ltd v British Telecommunications Plc (Scotland)* [2002] 1 All ER (Com) 321 (HL) para 92

[92] *Samancor Ltd v Mutual & Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) para 6

The above clause, despite its peculiar phrasing, appears to be a kind of "other insurance" clause. Conradie JA held that if it could be shown that the respondents had renounced their right to subrogation, it "would go a long way towards showing that they are not to be regarded as secondary debtors but undertook primary liability".[93] However, the part of the clause providing for a "[waiver of] all rights of subrogation …" was applicable against an expressly enumerated number of parties, and the court found that there was no renunciation of the respondents' right of subrogation generally.[94] The respondent had thus not undertaken primary responsibility.[95]

The court also considered the phrases "…this policy shall take precedence over any other insurance arranged by or on behalf of the Employer", and "the Insurers shall indemnify the Insured as if such other insurance did not exist". The court found that an insured can freely choose which one of two co-insurers to sue, which means that each policy issued could take precedence over any other, depending on which one of the two insurers an insured wished to claim from.[96] This clause was a mere confirmation of the principle that an insured whose risk was insured by more than one insurer could choose the insurer from whom it wishes to claim compensation in the absence of a clause in a policy that forces him to claim a *pro rata* portion from all insurers.[97] The appellant's construction of the clause, that the respondent undertook to indemnify the insured even where it had already been indemnified by another insurer, was rejected. It was found to be against the rule that an insured could not recover more than it had lost and was thus too radical a departure from the common law.[98] However, the clause precluded the respondent insurer from raising the existence of the asset policy as a defence, should a claim for indemnity be brought against it by the insured.

The excess clause in the asset policy read as follows:

> "'13. OTHER INSURANCES
> (a) If the Insured holds any other valid and collectable insurance or which, but for the application of any deductible, would have been collectable, with any other insurer covering a loss also covered by this policy, other than insurance that is specifically stated to be in excess of this policy or issued as co-insurance of any peril insured hereby, the insurance afforded by this policy shall be in excess of, and shall not contribute with, such other insurance.'"[99]

Conradie JA read the excess clause together with the relevant clause in the works policy and held that the effect of these two clauses was to place the works policy first in line. There was no question of the insured having to sue each insurer separately for its proportionate share.[100] The excess clause was thus not a refusal to contribute to a claim paid by another insurer. However, it precluded the respondent from claiming a contribution from Westchester,

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93 *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) para 8
94 Para 10
95 Para 10
96 Para 12
97 Para 12
98 Para 12
99 Para 14
100 Para 15

while the converse would not be the case.[101] The judge found that precedence provisions and excess-of-loss clauses determine relative contribution rights. They do not convert the liability of an insurer into a liability that is not equal and co-ordinate with that of a co-insurer.[102] Therefore, a situation of double insurance existed and the insurers were liable as equal and co-ordinate insurers.[103] Westchester should thus have brought a claim for contribution against the respondents in their own name.

7 Discussion of the Samancor judgement

The court, by virtue of its unbalanced focus on the works policy, failed to give due attention to the unambiguous excess clause contained in the asset policy and its effect on the right to contribution. This oversight appears to be the root cause of the problems addressed in the ensuing sections.

Conradie JA restricted his interpretation of the relevant clauses in both policies to establishing whether or not the respondent undertook primary liability. The court quoted the excess clause *verbatim*, followed by the observation that the "indemnity scheme adopted by the parties is uncomplicated".[104] The court then reverted to a discussion of the works policy and concluded that it was a "first-in-line policy and not an excess policy".[105] The court reiterated its earlier statement, in its interpretation of the clause in the works policy, that there was no need for the insured "to sue each insurer separately for its proportionate share".[106]

It is difficult to see how this conclusion follows from an interpretation of the wording of the excess clause in the asset policy. By repeating the arguments for the interpretation of the works policy clause, the court ignored the clear wording of the excess clause in the asset policy, which indicated an intention to make the asset policy an excess policy over other applicable policies. Focusing on the wording of the clause in the works policy to attribute meaning to the unambiguous excess clause is tantamount to preferring the respondent insurer's intention over that of Westchester.[107]

Moreover, the court rather curiously found that the excess clause had the effect of excluding the respondent's right to claim a contribution from the applicant, but that the converse was not the case. It is difficult to understand how an insurer can prevent a co-insurer from claiming a contribution from it, while it retains its right to contribution against the latter. This is particularly problematic if one considers that a claim for contribution is not based on any contractual relationship between the co-insurers. *Ex facie* the excess clause, Westchester limited its liability to excess cover in the event of an accidental overlap in coverage.[108] This resulted in the underwriting of a different risk,

[101] Para 16
[102] Para 16
[103] Para 17
[104] Para 15
[105] Para 15
[106] Para 12
[107] See discussion of foreign case law in 8 below
[108] One of the recognised functions of "other insurance" clauses

namely the shortfall in coverage enjoyed by the insured. Therefore, both insurers would be precluded from claiming a right to contribution.

The excess clause excludes policies specifically referring to it and providing co-insurance, and policies also expressly stating themselves to be in excess to the asset policy. The works policy was not one of the excluded policies, and the asset policy was therefore intended to provide excess cover over and above that provided by the former. This reading of the excess clause is not in conflict with the court's interpretation of the relevant clause in the works policy which only served to confirm an accepted principle of insurance law.[109]

The court's finding that precedence provisions and excess-of-loss clauses do not convert the liability of a co-insurer into liability that is not co-ordinate with that of another was not based on an interpretation of the excess clause contained in the asset policy.[110] The court simply assumed a standardized intention behind the use of excess clauses rather than giving effect to the intention of the particular insurer as expressed by the clear language of the clause.[111] This approach is contrary to the trite principle of giving effect to the intention of contracting parties by affording clear and unambiguous language its ordinary meaning.[112]

Moreover, in view of the conspicuous absence of South African authority on the interpretation of excess "other insurance" clauses, one would have expected the court to follow a comparative approach.[113] The proper interpretation of the excess clause would have provided the court with a sound basis for determining whether the works policy was primary to the asset policy and, consequently, whether or not there was double insurance for the purpose of a claim for contribution by Westchester.

What then is the relationship between standard indemnity policies[114] and excess insurance policies, and what are the implications thereof for the right to contribution? Are the insurers on the same level of liability which, as decided in *Samancor*, would give rise to a claim for contribution?

8 The right to contribution and excess policies

The possibility of a claim for contribution between insurers issuing excess insurance policies and those issuing standard policies depends on whether or not double insurance exists. The court in *Samancor* did not investigate the relationship between excess and standard policies. It therefore missed the opportunity to clarify the status of excess insurance policies relative to other applicable policies for the purpose of double insurance and, thus, contribution.

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[109] See n 96

[110] See n 101

[111] See n 106.

[112] See *Fedgen Insurance Ltd v Leyds* 1995 3 SA 33 (A)

[113] See *Santam Bpk v CC Designing BK* 1998 4 All SA 70 (C); *Sikweyiya v Aegis Insurance Co Ltd* 1995 4 SA 143 (E) The absence of a comparative approach is even more surprising in light of the wealth of decisions on excess "other insurance" clauses in other jurisdictions

[114] The term "standard" here refers to the main policy of insurance as opposed to excess policies that only apply once the standard insurance has been exhausted

In United States jurisprudence, excess policies are generally regarded as providing cover which is secondary to that of standard insurance policies.[115] It is accepted that an excess insurer does not insure the same risk as a standard insurer.[116] A number of courts have accepted that an excess insurer does not have a claim for equitable contribution against an insurer with standard liability, and *vice versa*.[117] In *Home Insurance Company v Cincinnati Insurance Co.*[118] the court found that the Home Insurance Company was not entitled to an equitable contribution because of its policy providing cover in excess to that of the Cincinnati Insurance Co. Excess insurers and standard insurers do not insure the same risk, given that cover under excess policies only commences once the cover provided by a standard policy has been exhausted.[119] The court went so far as to suggest that even if it was accepted that the two insurers provided cover for the same loss, the excess insurer would be precluded from claiming contribution from the primary insurer. In *Central Illinois Light Co v Home Ins Co*[120] the court similarly found that contribution is not applicable between primary and excess insurers because the policies do not cover the same risk.[121]

If these principles were to be accepted by a South African court, and it is submitted that they should be, then a claim for contribution would not be available between excess and standard insurers.

8 1 "True" excess policies and standard policies containing excess "other insurance" clauses

Both policies in the *Samancor* matter were standard indemnity policies that contained "other insurance" clauses. In the works policy the "other insurance" clause was different to those generally encountered. It merely confirmed the principle that an insured whose risk was insured by more than one insurer could choose the insurer from whom it wished to claim compensation in the absence of a clause in the policy that forced it to claim a *pro rata* portion from all insurers.[122] In this sense, the clause was an unnecessary confirmation of the common law rather than a true "other insurance" clause. For practical purposes, the works policy was a standard policy with no "other insurance" clause. The asset policy contained an excess "other insurance" clause, which

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[115] Smith & Simpson 2004 *Thurgood Marshall L Rev* 215

[116] O'Connor "Construction Law: Recent Issues in Property Coverage" 2007 *Wm Mitchell L Rev* 177 United States and Canadian commentators and courts often use the word "primary" to refer to standard policies and I shall similarly use the term "primary" when quoting United States sources

[117] See *Home Ins. Co. v Cincinnati Ins. Co* 213 Ill 2d 307 (2004); *Fireman's Fund Ins. Co. v Maryland Casualty Co.* 65 Cal App 4th 1279, 77 Cal Rptr 2d 296 (1998); *National Union Fire Insurance Company v Mississippi Insurance Guaranty Association* 507 F 3d 309(5th Cir 2007); *Caldwell Freight Lines Inc. v Lumbermans Mutual Casualty Co* 947 So 2d 948 (2007)

[118] 213 Ill 2d 307 (2004); See also *Fireman's Fund Insurance Co v Maryland Casualty Co.* 65 Cal App 4th 1279, 77 Cal Rptr 2d 296 (1998) where the court held that there was a "general rule that there is no contribution between primary and excess carriers of the same insured absent a specific agreement to the contrary"

[119] See n 130

[120] 213 Ill 2d 141, 290 Ill Dec 155 (2004)

[121] For a discussion of the case, see Caroll & Knee "Case Law Update" 2005 *DCBABR* 46

[122] *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) para 12

became operative because there was other insurance available. It could be argued that the cover under the asset policy was conditional upon no other collectable insurance being available. The asset policy thus became an excess policy only.

The question arises whether the asset policy should be treated in the same manner as a policy which, *ab initio,* functions as an excess policy only. This question becomes all the more important upon consideration of the potential policy issues that may arise where the insurer limits its liability in a manner that could possibly be detrimental to the interests of the insured.[123] Excess policies by their very nature contemplate the existence of available standard insurance, which consequently result in lower premiums for the insured.[124]

In *Samancor*, the premiums charged were calculated on an assumption of risk that included the event for which other insurance was available. However, the excess clause allowed the insurer to avoid liability for any insured loss up to the limits of the other insurance available, even though it had received premiums to bear this risk. The policy issues raised by this possibility are profound, and it is unfortunate that the court in *Samancor* did not address this issue. The court's failure to properly interpret the excess clause appears to have precluded the need to look at potential policy concerns.

With regard to the policy concerns, an important consideration would be whether the insured was aware of the excess clause when it concluded the works policy. If the insured had concluded the asset policy after the works policy was concluded, and assuming equal bargaining power of the parties, then the public policy concern would lose some of its significance. Nothing prevents an insured from effecting cover in excess ("true" excess cover) of that provided by another policy and negotiating a premium that is fair in relation to the cover provided. However, it is not clear from the facts of the case which of the two policies was entered into first.

A policy argument similar to the above can be raised where policies contain *pro rata* "other insurance" clauses. Where *pro rata* "other insurance" clauses are used, a premium on the potential wider liability of the insurer would probably be payable. However, these clauses have not posed any problems for South African courts, which have in general enforced them without hesitation.[125] There would appear to be no reason why excess clauses should be treated differently. South African courts should therefore recognise the right of an insurer to limit its liability by the insertion of an excess clause into its policy.

In the United States, the difference between "true" excess policies and standard policies providing primary coverage but containing excess "other insurance" clauses, has been considered judicially. In *Horace Mann Insurance*

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[123] Both policies could contain excess clauses, while it could also transpire that the other insurer is insolvent or could escape liability on some technicality

[124] For a discussion of the nature and characteristics of excess insurance policies, see *Horace Mann Ins. Co. v General Star Nat. Ins. Co* 514 F 3d 327 (4th Cir 2008)

[125] See *O'Flynn v Equitable Fire Insurance Co* 1866 1 Roscoe 372; *Lange & Co v SA Fire & Life Assurance Co* 1867 5 Searle 358; *Nathanson v Commercial Insurance Co* 1886 4 SC 461

Company v General Star National Insurance Company,[126] the court distinguished between "true" excess policies and what it termed co-incidental excess policies. A co-incidental policy would typically be a standard policy which provides primary coverage, but which in certain instances becomes an excess policy because of the operation of an excess "other insurance" clause.[127] The standard policy thus functions as an excess policy as soon as other insurance is available.[128]

Where the issue of priority arises between a "true" excess policy and a co-incidental excess policy, the categorization of the one policy as a "true" excess policy will settle the issue.[129] The "true" excess policy will be secondary to the primary policy even where the primary policy purports to make itself secondary to other available insurance. The court made it clear that "[this] rule applies without regard to the terms of the policies' 'other-insurance' clauses"[130] because 'other-insurance' clauses are an issue only when two or more policies apply at the same level of coverage:

> "An 'other insurance' dispute can only arise between carriers on the same level … it cannot arise between excess and primary insurers".[131]

The very nature of a policy as a "true" excess policy is determinant of priority issues between itself and a co-incidental excess policy, notwithstanding the excess "other insurance" clause in the other policy.[132]

Between a "true" excess policy and a co-incidental excess policy, the former can never be "other available" insurance because it covers another loss entirely. Consequently, no claim for contribution can lie between an underwriter of a "true" excess policy and that of a co-incidental excess policy.[133] However, in *Samancor*, this was not an issue as the works policy was neither contended to be nor was in fact an excess policy, be it "true" or co-incidental.

8 2 The operation and interpretation of "other insurance" clauses in other jurisdictions

Baily makes the claim that "most insurance policies today contain 'other insurance' clauses which are intended to dictate what is to happen in the event that there is more than one policy covering a single loss".[134] This contention is borne out by the considerable number of cases that have discussed the operation of "other insurance" clauses in various jurisdictions. Robertson similarly

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[126] 514 F 3d 327 (4th Cir 2008)
[127] 329
[128] 330
[129] 334
[130] 335
[131] 335
[132] 335
[133] See the analogous situation in *Allstate Ins. Co v Frank B. Hall & Co of Ca* 770 P 2d 1342 1347 (1989), where the court declined to allow *pro rata* contribution where two mutually repugnant "other insurance" clauses were at issue, because one was contained in what would otherwise be a primary policy, and the other in a "true" excess policy The very nature of the one policy as a "true" excess policy was dispositive of the priority question
[134] 1997-1998 *Drake L Rev* 835

refers to the voluminous litigation on other insurance clauses.[135] He notes that courts universally have enforced these provisions according to their terms where only one policy contained such a provision.[136]

In *Fireman's Fund Ins. Co. v Maryland Casualty Co.*[137] the California Court of Appeal acknowledged that generally, in cases of equitable contribution, courts have heeded excess provisions in insurance contracts as long as the rights of the policy holder were not adversely affected. Liability would thus be apportioned pursuant to the "other insurance" clauses contained in the policies.

The "other insurance" trend has also been the subject of discussion by English authors, albeit to a lesser extent than in the United States. In this regard, Merkin refers to restrictions on double insurance effected by policy clauses.[138] The author discusses the various guises in which these clauses may appear, which include clauses terminating cover under a policy in the event of an insured obtaining double insurance,[139] and rateable proportion clauses limiting the insurer's liability to its share of the insured's loss.[140] The common element shared by these two types of clauses is that they are triggered by the existence of a second valid policy providing cover for the same risk.[141] The restriction on liability effectively removes the possibility of double insurance. This has been described as generally being the intention behind "other insurance" clauses.[142]

In *Family Insurance Corp. v Lombard Canada Ltd.*,[143] the Canadian Supreme Court pronounced on the interpretation and operation of "other insurance" provisions. The court held that one must look at the wording of the policies to see whether either insurer intended to limit its obligation to contribute, by what method and in which circumstances.[144] In the absence of such a limiting intention, the doctrine of contribution will be applicable provided that the insurers' liabilities are equal and co-ordinate.[145] The court attempted to reconcile the "other insurance" clauses of two policies without preferring any one intention above the other. However, both policies contained excess "other insurance" provisions which, on their respective interpretations, would have resulted in the insured not having any cover if both were to be applied. The court found the two excess clauses to be mutually repugnant and simply followed the normal route of contribution. Moreover, the court

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135 "'Other Insurance' Clauses in Illinois" 1996 *S IL U L J* 403 The author discusses a considerable number of cases dealing with "other insurance" clauses He observes that "until the middle of the 20th century … insurance policies had no other insurance provisions" (410)

136 403 The author refers to numerous decisions from different US states in reaching this conclusion

137 65 Cal App 4th 1279, 77 Cal Rptr 2d 296 (1998) para 10

138 Merkin *Law of Insurance* 410

139 In other words, escape clauses See 4 above

140 Rateable clauses would be similar to *pro rata* clauses See 4 above

141 Merkin *Law of Insurance* 410 See also *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co.* (1877) 5 ChD 569, where the absence of double insurance was seen as precluding the application of rateable proportion clauses

142 See *Evans v Maritime Medical Care Inc* 87 D L R (4th) 173 (1992); *Gale v Motor Union Insurance Co.* [1928] 1 KB 359

143 2002 SCC 48

144 Para 28

145 Para 28

regarded "leaving the insured without any primary coverage because of two excess clauses" as absurd.[146]

This case is also instructive on the intention of insurers where excess clauses are used. The court regarded the insurers' intentions, as evidenced by the excess clauses, as limiting their liability "to excess coverage in the event that other insurance covering the same risk is available".[147] An excess clause shifts any primary loss to the first insurer, and makes the second insurance policy applicable to the extent that the insured's loss exceeds the first policy's limit.[148] Where both policies contain similar, and thus irreconcilable, provisions they will be regarded as cancelling each other out. Choosing one above the other does "violence to the intentions of the insurers and does not respect the obligation of both insurers to contribute".[149]

In respect of litigation on the operation of "other insurance" clauses, it would appear as if the majority of cases have had to deal with conflicting clauses, which could come in a number of combinations.[150] Here, United States courts have differed at times in their approach to the various combinations,[151] while Canadian and English courts have been more uniform in their approach.[152] Faced with two policies containing "other insurance" clauses, the Canadian Supreme Court in *Seagate Hotel Ltd v Simcoe & Erie General Insurance Co.*[153] found that a policy providing excess coverage was not other collectible insurance to a *pro rata* "other insurance" clause. The court specifically held that regard should be had to the "wording of the clauses referred to and the interpretation thereof".[154] Conflicting *pro rata* clauses and excess clauses can be reconciled, and the policy containing a *pro rata* clause would be primary to one containing an excess clause.[155]

The Canadian Supreme Court in *Family Insurance Corp. v Lombard Canada Ltd.*[156] considered the approach in *Seagate Hotel Ltd* as correct. Any real conflict, however, would be resolved by simply ignoring both clauses so as to ensure that no prejudice attaches to the insured.[157] However, where no

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[146] Para 38 The court furthermore observed that its approach was endorsed by English and the majority of Canadian courts English courts have indeed dealt with irreconcilable "other insurance" clauses in a similar fashion In this regard see *Gale v Motor Union Insurance Co.* [1928] 1 KB 359*, Weddell v Road Traffic and General Insurance Co* Ltd [1932] 2 K B 563; *General insurance Association Ltd v Haydon,* [1980] 2 Lloyd's Rep 149

[147] *Family Insurance Corp. v Lombard Canada Ltd.* 2002 SCC 48 para 35

[148] See Robertson 1996 *S IL U L J* 432 and the authorities cited there

[149] *Family Insurance Corp. v Lombard Canada Ltd* 2002 SCC 48 para 37 See also *McGeough v Stay N Save Motor Inns Inc.* 1994 Carswell BC 248; *Honeywell, Inc. v American Motorists Insurance Co* 441 N E 2d 348 (Ill App CT 2d Dist 1982); *Truck Insurance Exchange v Liberty Mutual Insurance Co.* 428 N E 2d 1183 (Ill App Ct 2d Dist 1981)

[150] See Robertson 1996 *S IL U L J* 410 One could have two or more policies containing the same "other insurance" clauses, or different types of "other insurance" clauses that would have to be reconciled

[151] See Richmond 1995 *Pepp L Rev* 1385 The author discusses various theories employed by courts when dealing with "other insurance" clauses

[152] Richmond 1995 *Pepp L Rev* 1373; Robertson 1996 *S IL U L J* 403 The authors discuss a considerable number of cases dealing with different combinations of conflicting "other insurance" clauses and the ways in which US courts have dealt with them

[153] (1980) 22 B C L R 374 (SC) 378

[154] 378

[155] 378

[156] 2002 SCC 48 para 28

[157] In this respect English and Canadian law would seem to correspond

such mutual repugnancy of clauses exists, "the process would simply be one of giving effect to the intent of the insurers".[158]

One can distill the following general guidelines from the above cases. Where one policy contains an "other insurance" clause, the enforcement of such a clause should pose no problem. Where both policies contain "other insurance" clauses that can be reconciled, this should be done. Mutually repugnant clauses should be ignored in order to prevent the absurdity of "leaving the insured without any primary coverage".[159] In *Samancor* the court was faced with one excess clause contained in the asset policy, and the works policy containing no "other insurance" clause. Therefore, the court should have heeded the effect of the excess clause, namely to turn the asset policy into an excess policy *vis-à-vis* the works policy.

8 3 A comparison of excess clauses

If one considers the wording of some of the excess clauses in the above cases, it becomes clear that the court in *Samancor*, despite a lack of South African authority, was not dealing with anything novel. One of the excess clauses in *Family Insurance Corp. v Lombard Canada Ltd*.[160] provided that

> "[if] other insurance exists which applies to a loss or claim or would have applied if this policy did not exist, this policy will be considered excess insurance and the Insurer is not liable for any loss or claim until the amount of such other insurance is used up".[161]

The other policy provided that

> "[if] other valid and collectible insurance is available to the Insured for a loss we cover under Coverages A, B or D of this form, … [this] insurance is excess over other existing insurance if any, whether such other insurance be, primary, excess, contingent or on any other basis …".[162]

In *Honeywell, Inc. v American Motorists Insurance Co.*[163] the excess "other insurance" clause provided that

> "[the] insurance afforded by the policy is primary insurance, except that when this insurance and any other valid and collectible insurance apply to the loss on the same basis, this insurance shall be excess of such other insurance and shall not contribute with such other insurance".[164]

Miller,[165] referring to the matter of *State Farm Mutual Automobile Insurance Company v Auto-Owners Insurance Company,*[166] regarded the excess clause in one of the policies in issue as "the usual excess clause".[167] The clause provided that " … [the] insurance with respect to a temporary substitute automobile,

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158 See n 146
159 See n 146
160 2002 SCC 48
161 Para 4
162 Para 4
163 441 N E 2d 348 (Ill App CT 2d Dist 1982)
164 349
165 Miller "Automobile Insurance-Policy Construction – 'Other Insurance clause in Primary Automobile Liability Insurance Policy held subservient to 'Excess' Clause in Non-Owner's Policy – *State Farm Mutual Automobile Insurance Company v Auto-Owners Insurance Company* Ala , 252 So 2d 631 (1971)" 1972 *Cumb-Samford L Rev* 191
166 Miller 1972 *Cumb–Samford L Rev* 191 provides the following reference: Ala , 252 So 2d 631 (1971)
167 191

a trailer and a non-owned automobile shall be excess over other collectible insurance …"[168]

Despite being somewhat differently phrased, all of the aforementioned excess clauses seem uncannily similar to the excess clause in the asset policy. On a literal reading of the clauses, one would be hard pressed to argue that the insurers could have all intended the same result in the United States and Canadian courts, namely, limiting the insurer's liability to excess cover, and thus excluding the right to contribution, while in *Samancor* they had no such intention.

The proper interpretation of the excess clause would have ensured that the correct finding was made. Westchester, its policy having become an excess policy by virtue of the excess clause, had no equal or co-ordinate liability with that of the respondent and thus, in terms of fairly uniform international practice, could not bring a claim for contribution against the respondent. Westchester should have brought a subrogated claim against the respondent.

9 Subrogation between the insurers

The court in *Samancor* accepted that subrogation may be available to an insurer against another insurer whose liabilities are not equal and co-ordinate to its own.[169] Therefore, the fact that the works policy provided primary coverage *vis-à-vis* the asset policy should have been dispositive of the question whether subrogation was available to Westchester. United States commentators and courts similarly seem to regard the mere fact of one insurer having primary liability *vis-à-vis* another insurer as giving the latter a subrogated claim against the former.[170] However, certain difficulties with this approach need to be noted.

Given that subrogation does not effect a transfer of the insured's rights of recourse against third parties,[171] the insured would not be successful with a claim against another insurer where it has already been indemnified. This would be contrary to the indemnity principle.[172] The insured would have no remaining right of recourse against the primary insurer once it has been indemnified by the secondary insurer for its loss.

Furthermore, it is doubtful whether an insurer that undertakes primary liability would still be concluding a contract of insurance.[173] Should the insurer with secondary liability be afforded the right to proceed on the basis of subrogation against an insurer with primary liability, the latter's contract with the insured would amount to more than a contract of indemnity. Therefore, the court in *Samancor* appears to have erred by accepting that subrogation is available to an insurer against another insurer who has undertaken primary

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[168] 191 n 2
[169] *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) para 6
[170] See authorities cited at nn 116-118, 120
[171] Reinecke et al *General Principles* para 373
[172] See *Castellain v Preston* (1883) 11 QBD 380 (CA)
[173] Sutherland & Cupido "Insurance Law" 2005 *Annual Survey of South African Law* 521

liability. This completely disregards the nature of a contract of insurance as a contract of indemnity.

With regard to the right of subrogation providing the insurer with a right of recourse,[174] this right of recourse would still be limited by the extent of the insured's remaining rights and remedies against a third party. Where the third party is a primary insurer, it would simply argue that the insured had already been indemnified.

The idea that a person who has caused loss to another by his unlawful conduct must bear the ultimate responsibility for that loss also falls short of providing an answer.[175] The primary liability of an insurer *vis-à-vis* another can be a matter of pure co-incidence in that a second policy could contain an excess "other insurance" clause. This would exclude the possibility of a claim for contribution and enable the insurer with secondary liability to recover the whole of the indemnity it provided to the insured from the insurer with primary liability. This situation should be distinguished from one where there is a willing undertaking of primary liability by an insurer *vis-à-vis* other insurers.

A voluntary undertaking of primary liability by an insurer as against other insurers readily lends itself to the application of the *res inter alios acta* principle, thus allowing for subrogation between excess and primary insurers. The *res inter alios acta* principle could also aid the secondary insurer in bringing a subrogated claim against the primary insurer when there has been a willful disregard by the latter of its duties to indemnify the insured in terms of a valid insurance policy.

However, the *res inter alios acta* principle appears not to be suited to the situation where an insurer incurs purely accidental primary liability *vis-à-vis* another. Unlike delictual wrongdoers or contractual defaulters, the very nature of their business means that insurers fulfill an important and sought-after social function. Therefore, the position of an insurer inadvertently incurring primary liability should not be reduced to, or equated with, that of a delictual wrongdoer or contractual defaulter.

The fact that any insurer can validly limit its contribution liability does appear to be a moderating factor for the concern that the whole loss could be shifted to such an insurer without its consent. Accidental primary liability is reasonably foreseeable, and an insurer failing to provide for this possibility in its policy could be regarded as an insurer reconciling itself with the possibility of having to make good the entire loss of an insured. However, this argument is only tentatively offered and should not be extended to a general approach unless it can in fact be determined that an insurer has indeed reconciled itself

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[174] Reinecke et al *General Principles* para 376 This reason appears plausible if one assumes that the possibility of the right of subrogation against third parties is taken into account by insurers when calculating premiums In this regard see also Hasson "Subrogation in Insurance Law – a Critical Evaluation" 1985 *Oxford Journal of Legal Studies* 416 The author argues that "… insurers do not seem to take subrogation recoveries into account when fixing premiums for their policy holders" (422)

[175] For the purposes of subrogation, the social function served by subrogation (see Reinecke et al *General Principles* para 376) and the principle of *res inter alios acta* appear to trump the indemnity principle However, on a practical level, the indemnity principle is not violated because the insurer is the ultimate beneficiary of the right

to this possibility in a particular situation. The principle of *res inter alios acta* could not have been designed for this type of situation and should not be used to determine rights to subrogation between secondary and accidental primary insurers.

In addition to the above considerations, the issue of Westchester being an excess insurer remains of importance in determining whether or not subrogation is available to an insurer. Westchester was not legally liable for the loss of the insured up to the limit of the works policy. Should the *sine causa* payment by Westchester give rise to a subrogated claim against the respondent?

Reinecke and others suggest that subrogation should be available to an insurer who makes a payment in the belief that it is legally liable to make such payment.[176] The basis for this contention is the English decision of *King v Victoria Insurance Company Ltd*.[177] In this case, the court found that a third party who caused a loss cannot insist on "ripping up" a settlement between an insurer and its insured, "and on putting in a plea for the insurers which they [the insurers] did not think it right to put in for themselves; and all for the purpose of availing himself [the third party] of a highly technical rule of law which has no bearing upon his own wrongful act."[178] Moreover, the court questioned the right of a third party to deny that a payment was made in terms of a contract where the insurer "treats it as within the contract".[179] Where an insurer makes a payment in consequence "of a policy granted by [it] and in satisfaction of a claim by the insured", and regards this claim as "a claim under the policy", the insurer would be entitled to the "remedies available to the insured".[180] Therefore, the right of subrogation would be available to the insurer.

However, this judgment should be approached with caution. While the arguments of the court are logical, they appear to be based on considerations of what a Court of Equity would have done. In this regard Merkin, commenting on the *King* case, doubts whether it sheds any light on the question whether subrogation is available for payments made by an insurer which is inconsistent with the terms of the policy.[181] This would conceivably depend on the basis for the right of subrogation.[182] Should the right to subrogation be based on equity, then payment would not exclude the right to subrogation.[183] However, should the right to subrogation be the result of an implied term of the contract, then payment for an uninsured peril should not give rise to a claim for subrogation.[184] Such a payment would not be in terms of the contract. One needs to bear in mind that considerations of equity might have informed the Privy Council decision in *King v Victoria Insurance Company Ltd*.[185] Therefore, the value of

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[176] Reinecke et al *General Principles* para 385
[177] [1896] AC 250 (PC)
[178] 254
[179] 255
[180] 256
[181] *Law of Insurance* 390
[182] 390
[183] 390
[184] 390
[185] [1896] AC 250 (PC)

this decision on the issue of payments not due in terms of the policy, and an insurer's right of subrogation, is questionable.

In South African law the right to subrogation, if it is to be retained, and not to be subsumed under the law of unjustified enrichment, is best regarded as an implied term of the contract of insurance.[186] Westchester, being an excess insurer, had made payment for an uninsured peril and therefore could not bring a subrogated claim in the name of the insured against the primary insurer. The payment by Westchester was a payment made *sine causa*, and the respondent was certainly enriched at its expense. Consequently, Westchester should have used the *condictio indebiti* to recover the money it had paid. However, should Westchester have been aware of the other available insurance, its payment would have been an *ex gratia* payment, and it would not have had any remedy available to recover the payment made to the insured.

Another obstacle to successful recovery using the *condictio indebiti* could be that Westchester's mistake in making payment was not excusable.[187] In this regard Westchester, by simply asking the insured about the availability of other insurance, could have ascertained that it was not legally obliged to make payment to the insured. Insurance policies often contain provisions requiring the insured to notify the insurers of the existence of other available insurance policies. Therefore, Westchester's mistake appears to be inexcusable given the ease with which it could have determined that it was not legally liable to make payment to the insured.

However, the general requirement that a mistake must be excusable should not be extended to insurers. As mentioned, they fulfill an important social function. Like executors, to whom the requirement of excusable mistake does not apply, insurers can also be said to act for the benefit of others.[188] The payment by Westchester to the insured was made for the benefit of the insured.[189] It would, therefore, be good policy to exclude insurers from the operation of the requirement, thereby not unnecessarily subjecting the insured to overly obsessive insurers trying to protect themselves against mistaken payouts.

Westchester's summary payment of the insured's claim is to be commended as the kind of approach one would ideally like to see on the part of insurers. Therefore, Westchester should have made use of the *condictio indebiti* to recover the money it had paid to the insured. As mentioned before, our law has the necessary mechanisms to assist an insurer while at the same time upholding the indemnity principle, without resorting to the right to subrogation with all its concomitant legal theoretical difficulties.

10 Further comments on primary and secondary liability

In *Samancor*, the court's use of the terms primary liability and secondary liability was not entirely satisfactory. The court accepted that "where a

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[186] Reinecke et al *General Principles* para 377 Also see *Rand Mutual Assurance Co Ltd v Road Accident Fund* [2008] ZASCA 114 para 18

[187] Lotz "Enrichment" in *LAWSA 9* rev Brand (1996) para 212

[188] Para 212

[189] Para 212

(primary) indemnifier happens to be an underwriter, it is in the same position as any other debtor" and that "[the] insurer and the wrongdoer become co-principal debtors each primarily liable for the whole debt."[190] However, this cannot be an accurate description. It could be interpreted to mean that between an insurer undertaking primary liability on the same level as a wrongdoer and that wrongdoer, the possibility of a subrogated claim by the former against the latter is excluded. Such a construction would allow an actual wrongdoer to escape liability.

The fact that the court couched the concepts of primary and secondary liability in absolute terms failed to describe accurately the hierarchy of liability that exists. Relative to an insurer with secondary liability, another insurer might have primary liability but, as between the primary insurer and the wrongdoer, the liability of the primary insurer would be secondary. These are relative concepts that need to be understood in this manner in order to deal with rights to contribution and subrogation between insurers appropriately.

On the authority of *Caledonia North Sea Ltd v British Telecommunications Plc (Scotland)*,[191] the court found that an insurer may have a subrogated claim against a contractual indemnifier, provided its liability is not equal and co-ordinate with that of the insurer.[192] One contractual indemnifier might have secondary liability *vis-à-vis* another, or a wrongdoer for that matter, but may nevertheless be at a level of liability lower than the insurer. The contractual indemnifier's liability, even if not truly primary, would not be equal and co-ordinate with that of the insurer, whose position can almost be described as being on a tertiary level of liability. The court appears to have been aware of the possibility of more than two layers of liability but failed to articulate this clearly.[193]

11 Conclusion

In the *Samancor* case, the court grappled with the well established principles of contribution and subrogation, their interaction and respective areas of application. The task of the court was complicated further by contractual provisions that were sophisticated attempts to escape the confines of principle. The difficulties experienced with these adopted principles seem unnecessary in view of the readily available mechanisms in South African law that can serve the needs of insurance law. The appropriate enrichment action would provide the insurer with a direct right of recourse against a wrongdoer, or against another insurer that has undertaken primary liability for the same loss. The only proviso would be that an insured, having been indemnified by its insurer, should not have any remaining rights of recourse against the wrongdoer.

Giving a direct enrichment claim to the insurer against a third party wrongdoer, or a party with primary liability *vis-à-vis* its own, will also ensure that

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[190] *Samancor Ltd v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 (SCA) para 7
[191] [2002] 1 All ER (Com) 321 (HL)
[192] Para 5
[193] Para 5

the loss is borne by such a wrongdoer or party with primary liability. There would consequently be no need to retain the principle of *res inter alios acta* in order to explain the right of an insurer to claim in the name of the insured.

The right of contribution, however, could serve the useful function of spreading costs over the insurance industry as a whole. The ease with which insurers could exclude the operation of contribution with the appropriate clauses acts as the appropriate counterweight. In the absence of such clauses, the right to claim contribution should be regarded as *sui generis* to insurance law and it should be maintained.

However, "other insurance" clauses, as an expression of intent, should be honoured by our courts. The insufficient appreciation of the content and meaning of the excess clause in *Samancor* can be attributed to its virtual absence from South African jurisprudence, and the court's understandable preoccupation with concepts in need of sound legal theoretical foundations. The court, consequently, allowed the clear and unambiguously expressed intention of an insurer to go unnoticed.

SUMMARY

Insurers typically insert "other insurance" clauses in order to specify how their policies should interact with other policies covering the same risk. This enables insurers to avoid situations of double insurance and, consequently, claims for contribution by co-insurers. Although it is standard practice in the South African insurance industry to insert "other insurance" clauses into contracts, their functioning has been neglected in the legal literature. This article aims at increasing the understanding of these clauses through evaluating the decision of the Supreme Court of Appeal in *Samancor v Mutual and Federal Insurance Co Ltd* 2005 4 SA 40 (SCA)

In *Samancor* the opportunity existed to consider and develop the law regarding the impact of "other insurance" clauses on the rights to contribution and subrogation. Unfortunately, the court failed to use this opportunity, since it ignored an "other insurance" clause which allowed for the policy containing it to become an excess policy to other policies covering the same risk. The court failed to entertain the possibility that the "other insurance" clause could have this effect. The oversight appears to be the result of the context within which "other insurance" clauses occur. They operate within the context of rights to contribution and subrogation, which were adopted from English law without due regard to their doctrinal bases. The court's preoccupation with the concepts themselves resulted in the intention of the insurer, as clearly expressed in the "other insurance" clause, going unnoticed.

The conclusion is reached that it has to be re-examined whether there is any need for recognizing rights to subrogation and contribution. It is argued that the South African law of unjustified enrichment and the mechanism of cession make a separate right to subrogation superfluous. However, good policy reasons exist for the retention of the right to contribution.